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### An obscure 450th anniversary for Glasgow

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## **An obscure 450th anniversary for Glasgow: recrimination, reconciliation, and the gestation of children in the womb**

Posted on [08/08/2013](#) by [Thomas Green](#)

Four hundred and fifty years ago this month, on 6 August 1563, a Scottish Protestant radical called John Willock sat in judgement as Superintendent of Glasgow and 'the West', and pronounced a sentence of the newly introduced Protestant divorce on the ground of adultery in favor of John Maxwell of Calderwood against his spouse Elizabeth Hamilton.

Willock himself was one of the leading reformers of the Scottish Reformation, who had marched with the forces of the earl of Glencairn to the defence of the Protestant congregation of St John's town (or Perth) at the outbreak of the Wars of the Congregation in May 1559. In those first heady days of the 'uproar for religion' he had ministered to the forces of the Protestant Lords of the Congregation with John Knox and John Erskine of Dun. Knox and Willock went on to be the first ministers of St Giles' at Edinburgh. All three men would have gone on to be Superintendents of the early Church of Scotland, but whilst Willock accepted the commission for Glasgow, and Erskine accepted the commission for Angus and the Mearns, Knox declined the same for Edinburgh and the Lothians, which office went instead to John Spottiswoode, father of John, Archbishop of St Andrews, and grandfather of Sir Robert, author of Spottiswoode's Practicks.

In the sunny environs of medieval Glasgow 450 years since, it may be speculated that John Willock sat in judgment in the old consistory place of the north tower of Glasgow Cathedral, where the old Officials had sat during the Catholic ascendancy, and which cathedral was now Willock's parish kirk.

This sentence of divorce pronounced by Willock would have been lost to posterity along with the no-longer extant registers of the kirk of Glasgow, had it not subsequently been reduced by two of the first Commissaries of Edinburgh, Edward Henryson and Clement Little, or Litill, sitting in judgment in the Tolbooth of Edinburgh on 16 March 1564/5.

The grounds of the sentence of divorce pronounced by Superintendent Willock, and the grounds upon which it was subsequently reduced by the Commissaries of Edinburgh are of considerable interest. The initial action brought by John Maxwell of Calderwood before the Superintendent was grounded upon Elizabeth Hamilton's alleged adultery. In her defence, Hamilton had argued relevantly that her husband, the pursuer, was also guilty of adultery, and that since the like faults were held to cancel each other out (i.e. Digest 23.3.39), the action for divorce might not be brought. To this Maxwell replied that although he had committed adultery, he had nevertheless been reconciled to Hamilton thereafter, but prior to her own adultery. The principle of reconciliation is to be found in both Roman and Canon Law (i.e. Codex 9.9.11; Decretum Gratiani C.31, q.1, c. 5 to 7). This reply to the defender's exception was found relevant by the Superintendent, and in the even proven, Maxwell being divorced from his wife, and being granted license to remarry with immediate effect.

This license to remarry was exercised at once by Maxwell, who took Elizabeth Lindsay to wife. Lindsay, however, gave birth within six months of her marriage to Maxwell, to a child acknowledged by the couple to be theirs. This therefore raised the distinct possibility the child had been conceived at a time when Maxwell was still married to Hamilton, and more importantly at a point after the reconciliation which had so helped Maxwell's cause. Hamilton decided to test this possibility at law, and raised a precept of reduction against the Superintendent's

sentence before the newly appointed Commissaries of Edinburgh.

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The action for reduction before the Commissaries raised two nice points: the first was whether or not the Commissaries could actually reduce a sentence pronounced by the Church of Scotland; the second concerned the gestation of children in the womb. On this first head, Maxwell's procurator, Henry Kinross, argued that the Commissaries were not judges competent in the matter, and that appeal lay rather from the Superintendent to the General Assembly of the Church of Scotland. Against this Hamilton's procurator argued that the Commissaries were competent, because the case was not being brought because the Superintendent of Glasgow had been at fault in pronouncing his sentence of divorce, but because new evidence had come to light, which ought to be discussed before the Commissaries: this latter argument evidently prevailed.

As to the gestation of children in the womb, it was argued "be commone calculatioun the said barne to haue bene thre quarteris of ane zeir in the moderis wombe eftir the conceptioun thair of, as barnis that ar borne to the commone iust maturitie vsis to be borne, with perfite nailis vpoun tais and fingearis, as the said barne had the tyme of the birth thair of. It necessarlie followis that the said barne wes consaunt in adulterie, thre monethis of thairby, at the leist diueris monethis, preceding the dait of the said pretendit sentence of diuorce and eftir the proponing of the said reconciliatioun". This was found relevant by the Commissaires, admitted to probation and proven. Willock's sentence of divorce was therefore reduced, Maxwell's second marriage declared null, and Maxwell ordained to adhere to his first wife, Elizabeth Hamilton.

The peerage lawyer and genealogist John Riddell commented upon this case in his *Inquiry into the Law and Practices of Scottish Peerages* of 1842, where he considered Henryson's and Little's judgement in relation to Stair. Thus Riddell: "Stair inculcated long afterwards, that though the time of conception 'hath an ordinary course of nine months,' yet a child has been affiliated upon a father, 'by reason of the marriage, tho it proceeded the birth of the child only by the space of 8, 7, or the *beginning of 6 months*, especially if, by the judgement of phisicians, the immaturity of the child concurred; yea, this presumption will attribute the child to a father, tho the child be born 9, 10, or 11 months after the father's death' ".

The decret of the Commissaries of Edinburgh by which the Superintendent of Glasgow's sentence of divorce was reduced may be found in Thomas Green, *The Consistorial Decisions of the Commissaries of Edinburgh, 1564 to 1576/7* (Edinburgh: The Stair Society, 2014), Item 12, which volume is due to be published during the summer of 2014.

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